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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~641~~ 17

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

v.

PARAMOUNT PICTURES THEATRES CORPORATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSELL HARDY,
JAMES WALLACE KEMP,
HENRY SCHAEFER, JR.,
Attorneys for Petitioners.

February, 1953.

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No.

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

v.

PARAMOUNT PICTURES THEATRES CORPORATION, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, CHARLES REAGAN, BARNEY BALABAN and Y. FRANK FREEMAN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Partmar Corporation and Fanchon & Marco, Inc., pray that a writ of certiorari issue to review the judgment entered in this case on December 16, 1952, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the district court is printed at Record p. 70, and is reported at 97 F. Supp. 552. A per curiam opinion of the Court of Appeals is printed in full, *infra*, pp. 27-28.

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JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1952. The jurisdiction of this Court is based on section 1254 of the Judicial Code. (28 U. S. C. A. sec. 1254)

QUESTIONS PRESENTED

1. Whether a court may dismiss with prejudice, without any trial, claims for treble damages for violation of the antitrust laws, which have been sustained by the court as valid, and which are not otherwise barred.

2. Whether such dismissal lacks due process of law.

3. Where claims for treble damages for violation of the antitrust laws have been filed as counterclaims, and a separate trial of the main action apart from and preceding a trial of the counterclaims has been ordered by the court, and the issue of fact and law in the counterclaims and the main action are different, and a separate trial of the main action has been had—may the court dismiss the counterclaims with prejudice at the end of the trial of the main action and without any trial of the counterclaims.

4. Whether such dismissal lasks due process of law.

5. Whether, in an action under the antitrust laws to recover treble damages, it is clearly erroneous for the court to refuse to receive two final non-consent judgments entered in a suit by the United States against the parties who are also defendants in the treble damage suit, and based on the same conspiracy in restraint of trade on which the treble damage suit is based, as *prima facie* evidence of all matters respecting which the judgment would be an estoppel between the parties thereto, including the fact the defendants have engaged in the conspiracy.

6. Whether, in an action by a landlord to evict a tenant, brought under the California statute, in which the issue made by the landlord is whether he has violated the federal antitrust laws, and in which the landlord introduces in

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evidence two judgments entered in a case brought against him and others by the United States, which adjudge the landlord guilty of violations of the antitrust laws—the judgments are or are not conclusive evidence against him of matters respecting which they would be an estoppel between the parties thereto.

7. Whether a court may receive such judgments in evidence, subject to the limitation made by the offering party, that they shall be received as evidence merely of the entry of only one among many injunctive provisions against him contained in the judgments, and thereafter in the same case enter a valid judgment in favor of the offering party and against his adversary, to the effect that the offering party has not been guilty of the violations of the antitrust laws adjudicated in those judgments.

8. Whether an adjudication in one case, that one contract granting a license for the use of motion pictures in one theatre, which contains admission price fixing provisions and other restrictive conditions in favor of the licensor, is not, standing alone, violative of the antitrust laws, amounts to an adjudication that the price fixing and other restrictive provisions are not parts of a general conspiracy for fixing admission prices and imposing other restrictions on a nation wide scale, and constitutes a bar to an action for treble damages based on such conspiracy.

9. Whether such an adjudication, bars treble damage claims under the antitrust laws by the licensee, for recovery of conspiracy and monopoly overcharges on the pictures which have been licensed under the contract for use in his theatre.

10. May a court entertain an action in which the plaintiff alleges that he has been guilty of violating the antitrust laws, and has been prohibited by the judgment of another court from continuing the violations, and in which the plaintiff seeks a judgment in his favor based on the fact of his violation.

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11. Whether a system for the allocation of motion pictures among exhibitors for use in their theatres, by which practically every theatre in every community throughout the United States, including Los Angeles, is classified in a fixed position as to the run and clearance for which it may receive licenses for pictures—which system has been built up, accepted, adopted and practiced by the major distributors, who distribute eighty or more percent of the pictures, and according to which the theatres of the distributors receive practically exclusively the first and preferential use of the pictures—and which is effectuated by uniform and unanimous refusals of the distributors to license pictures to anyone or any other terms—constitutes a conspiracy in restraint of trade in violation of the antitrust laws.

STATEMENT

Briefly stated, in this case a landlord sued to evict a tenant from a theatre in which he was engaged in the motion picture exhibition business, based on the allegation in the landlord's complaint that he had terminated the tenant's lease because of violation of the antitrust laws by the landlord. Although in *United States* v. *Paramount,* 334 U. S. 131, the landlord had been found guilty of practicing a conspiracy in restraint of trade by a wide variety of methods and on a nationwide scale, the allegation in the eviction suit was limited to a fragmentary part of that conspiracy, and thus tendered for decision a sham issue. After a long trial, to which the tenant objected, the court entered a judgment on the sham and limited issue to the effect that the landlord's action, so limited, had been perfectly lawful. The court then refused to try, and dismissed with prejudice, counterclaims of the tenant against the landlord for treble damages which were based on the conspiracy in the *Paramount* case in its entirety, and injury to petitioners in their property and business, on the ground that the judgment in the eviction case was decisive of and barred the counterclaims. The effect was to enable the

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landlord, with the assistance of the court, to whipsaw the tenant on the counterclaims.

At the time laid in this case, the respondents were affiliated corporations and officials thereof, and were engaged in the production, distribution and exhibition of motion pictures. Paramount Pictures Inc. owned all of the stock of the two other corporation respondents. (R. 6, 8) The corporation and individual respondents will be referred to collectively as Paramount.

Paramount was the largest combination of motion picture theatres in the world and in the United States. It operated 1,395 theatres in the United States. (*United States* v. *Paramount*, 334 U. S. 131, 167)

Petitioner Partmar Corporation operated one motion picture theatre, which was located in Los Angeles. It was the only wholly independent first run exhibitor in the area; that is, it was independent of any corporate affiliation with any of the large picture and theatre combinations in the business, but in other respects its independence was severly limited by the monopoly held and practiced by those combinations. (R. 4, 9, 12)

Partmar occupied the theatre as a lessee of Paramount, for a term to expire on March 17, 1952. (R. 4) Petitioner Fanchon & Marco, Inc., owned all the stock of Partmar, and was a party to the lease, as a guarantor of performance by Partmar. (R. 23) The lease provided for extremely large theatre rental payments to Paramount, in terms of percentages of the gross receipts of the business. (R. 147) Partmar was also heavily dependent upon Paramount for pictures to run the theatre, because of unlawful monopoly conditions appertaining to the supply of pictures created by respondents and others, as is more fully described in the opinion of this Court in *United States* v. *Paramount*, 334 U. S. 131, and Paramount took advantage of that condition to impose very large film rental charges on Partmar.

On May 1, 1947, Paramount brought suit in the United States District Court at Los Angeles to evict Partmar from

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the theatre, under the California landlord and tenant summary eviction statute. (R. 3) In that suit petitioners filed counterclaims for treble damages under the antitrust laws, based on the fact that Paramount had been engaged in the unlawful restraint and monopoly described in the *Paramount* case, and had compelled petitioners to pay excessive theatre rentals and license fees for pictures needed for the theatre. (R. 27) By order of the district court, the eviction suit and the counterclaims were separated for trial. (R. 44) After a trial of the eviction suit alone, eviction of Partmar was denied. (R. 109) Without any trial of the counterclaims, which had previously been held by the court to be well pleaded and valid, they also were dismissed with prejudice, in the judgment denying eviction. (R. 109) On appeal from the dismissal of the counterclaims, the denial of trial was affirmed *per curiam* by the Court of Appeals for the Ninth Circuit.

The eviction suit was based on a judgment of the United States District Court for the Southern District of New York dated December 31, 1946, in *United States* v. *Paramount*, 66 F. Supp. 323, 1946; 334 U. S. 131, 1948. (R. 12-15) In that case respondents and others were adjudged guilty of conspiracy to restrain and monopolize the distribution and exhibition of motion pictures on a nationwide scale. Among other things, the judgment prohibited the continued performance of so-called franchise contracts between defendants in the *Paramount* case and exhibitors, i.e., contracts which provided for furnishing pictures to any exhibitor for a period of more than a year. (R. 302) This particular prohibition was later vacated on appeal by this Court, and was the only prohibition in the judgment of the district court not affirmed. (334 U. S. 156) Petitioners were not parties to the *Paramount* case.

Such a franchise was in effect between Paramount and Partmar, running for a term coincident with the lease. The lease contained a provision that the landlord should have an option to terminate the lease if at any time during the

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term the franchise should be terminated. (R. 10) The eviction suit involved that provision.

The franchise was merely a general contract by which Paramount agreed to make contracts from time to time in the future for a period of ten years, for specific pictures to be produced. (R. 247, 295) It required that Paramount pictures should be used in the theatre for forty-six weeks of each year. (R. 251) The purpose of the eviction clause, in the theatre lease was to tie the Paramount pictures and the theatre together, and especially to continue holding them together if at any time in the future it came to pass that the supply of pictures from all companies should become available to the tenant. In that event, Paramount could oust, or attempt to oust, the exhibitor, take over the business itself, and easily continue the same degree of exclusive use of Paramount pictures. The purpose of the judgment in the *Paramount* case was to make the entire supply of pictures freely available in a competitive market to all exhibitors. The purpose of the eviction suit was to defeat that judgment as to Partmar.

The eviction complaint alleged that the judgment in the *Paramount* case prohibited performance of the franchise, that it was a "final" judgment, that it terminated the franchise, that the landlord had then terminated the lease, and that petitioners had refused to vacate the theatre on demand. (R. 16, 17) There was no allegation that the tenant was not making rental payments nor otherwise performing the terms of the case. Petitioners moved to dismiss the suit on the ground that the franchise had been enjoined because of violations of law by respondents, that the court ought not to grant relief to wrongdoers in a case based on their own wrong, that petitioners were not participants in but victims of the wrongdoing, that the lease did not grant any right to terminate the lease if the franchise should be terminated because of the unlawful conduct of Paramount, that the judgment did not apply to the franchise, and that it was not final but was pending on appeal to this court. The motion was denied.

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Petitioners then filed an answer in which they set up as a defense that Paramount was a party to the conspiracy in the *Paramount* case, and was seeking to evict petitioners in pursuance of that conspiracy, that the effect of the eviction would be to drive petitioners out of business and enable Paramount to take over the theatre, and thus increase and extend the unlawful control condemned and required to be discontinued by the very judgment on which the eviction suit was based. (R. 27) That defense also was rejected by the district court as an improper collateral attack on the right to terminate the lease.

Petitioners included in the answer counterclaims for treble damages and injunctive relief. (R. 36) The damages claimed were for monopoly overcharges exacted by Paramount for pictures furnished for the theatre and for theatre rentals; that is, for the difference between the license fees and theatre rentals which would have been paid in an unrestrained and unmonopolized market and the fees and rentals which had been paid under the monopoly conditions found in the government case to have been established by Paramount and others.

The counterclaims named as defendants seven parties who were not parties to the eviction suit—Paramount Pictures Inc. and six of its principal officials. (R. 36) While the complaint alleged that these defendants were engaged in the conspiracy in the *Paramount* Case, it did not name as defendants in this case the other co-conspirators in the *Paramount Case.*

On motion to dismiss the counterclaims, they were sustained as valid actions under the antitrust laws. Both actions—the eviction suit and the treble damage claims—were then at issue on the facts.

Shortly after the decision sustaining the counterclaims as valid, the eviction suit and the counterclaims were formally separated for trial, by order of the district court, on motion of Paramount. The order provided for entirely separate trials of the two suits, and for trial of the eviction case first. (R. 44-45) The separation was based on the

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fact that the cases were different as to the evidence and the facts and law. As petitioners agreed that this was correct, they made no objection to separate trials.

At this stage of the case, the whole factual basis of the eviction suit was suddenly swept away, by the decision of this Court on May 3, 1948, in *United States* v. *Paramount*, 334 U. S. 131. In that case this Court reversed the prohibition of franchises. As that decision negatived the fact on which the eviction suit was based—termination of the franchise—petitioner moved for dismissal; this time on the ground that the case had become moot by the demonstrated nonexistence of the basic fact. The motion was denied.

As the reversal of the judgment by this Court made it impossible for Paramount to oust petitioners on the ground that the franchise had been enjoined, Paramount deserted that ground and based the claim for repossession of the theatre on the radically different ground (1) that the franchise was in unlawful restraint of trade, standing alone, and apart from the conspiracy found as a fact in the government case, and (2) that the franchise had been terminated by Paramount for that reason and independently of the judgment in the government case. Specificaly, it was asserted that the franchise was unlawful, standing alone, because it provided that Paramount should fix the admission prices to be charged at the theatre, that it required the theatre to use Paramount pictures exclusively, and provided for the imposition of clearances to be determined by Paramount. (R. 46-47)

In refusing to dismiss the eviction suit, the district judge fully agreed with this new thesis as to the issue in the case. In doing so, he treated the decisions of this Court and the District Court in the *Paramount* case, as having no effect, as to the facts or law, on the eviction suit before him, except possibly as decisions of other courts in similar cases. The statement of this Court with reference to the very franchise in this case, that "we cannot say on this record

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that franchises are illegal *per se* when extended to any theatre or circuit no matter how small" (334 U. S. 156), was treated as if it were a statement and decision on entirely different transactions of entirely different parties.

The following are specific statements of the district judge to this effect:

> I am at a loss still to understand what the New York action has to do with this case unless it is merely to set a precedent which we can follow here . . . (R. 47)
>
> . . . . . .
>
> But here, the question is, was this franchise agreement legal or illegal under the Sherman Act. That is a question to be determined here, not in New York or somewhere else . . . (R. 47)

Finally the trial of the eviction suit began on November 8, 1950. For eighteen daily sessions of the court, it continued, and at length ended in a decision denying eviction. (R. 113-142)

The change of the issue in the case from termination of the franchise by the judgment in the government case, to termination by Paramount because unlawful, which was permitted after the decision of this Court vacating the judgment as to franchises, was not accomplished by any change in the pleadings or by other formal procedure. As no amendment of the complaint or other procedural action was taken, it was not possible for petitioners to oppose or admit or deny the new case by any responsive pleading.

The case was therefore tried without any standard or guide except that the decision should turn upon the lawfulness or unlawfulness of the conduct of the landlord. According to that rule if the landlord should convince the court by evidence and otherwise that the franchise was unlawful because of the restraints imposed on the tenant by the landlord for the benefit of the landlord, the court should award the landlord possession of the theatre, and turn the innocent tenant out.

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The issue thus tendered for the decision of the court, was an unrealistic and sham issue, for it selected as the subject for trial and decision a small detached portion of a nationwide course of action. For the court to conduct a trial for the purpose of deciding the legality of admission price fixing, clearance and exclusive dealing provisions of one contract for one theatre, isolatedly considered, when in truth these provisions were parts of a nationwide conspiracy for fixing prices and maintaining an exclusionary system, which, moreover, had been specifically adjudicated to be unlawful by this Court, was to spend time on an academic and non-existent case, at the instance and for the benefit of a self-accusing wrongdoer.

Petitioners had no recourse, however, but to submit to the decisions of the district court, and to make their defense at the trial conformably to the case as thus devised by the landlord and sanctioned by the court. Petitioners, therefore, based their case upon the premises (1) that the self-accusation of unlawful conduct by the landlord was unnatural and not permissible as a basis for judgment in his favor, (2) that it was elementary that the franchise, standing alone and apart from the conspiracy, was lawful, and (3) that the cause of the restraints and monopoly conditions existing in the motion picture business in the Los Angeles area was not the franchise, but the conspiracy in the *Paramount* case.

The distinction between the issue in the eviction suit and the issue in the counterclaims—illegality of the franchise standing alone, and the conspiracy in the government case—was consistently maintained against petitioners throughout the trial, and the order separating the two cases remained effective without change. No order or stipulation or procedure to the contrary occurred. At the opening of the eviction suit, counsel for the landlord said that both sides had prepared their cases pursuant to the separation order—

> so that the evidence will proceed, so far as the plaintiff is concerned, and I believe it has been indicated by

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> counsel for the Fanchon & Marco and Partmar group that they are prepared to proceed accordingly in pursuance of Judge Mathes' order for these seperate trials. My opening statement, therefore related solely to this first separate trial on the unlawful detainer and I reserve the opening statement on the counterclaims to a later time—perhaps next month when we get to that, or earlier if we do so, and I understand that counsel for the defendants are preparing their presentation and their statements accordingly. (R. 118.)

See also Record, pages 114, 115, 116, 117.

Accordingly, the opening statements of both parties were confined to the facts relative to the character of the franchise standing alone and apart from conspiracy. No witnesses were called and no evidence was presented by petitioners to establish, or by respondents to rebut, the counterclaims and the conspiracy upon which they were based, and no arguments or briefs for or against the counterclaims, were at any time made or submitted to the court by any of the parties.

Judgments in the *Paramount* case were introduced in evidence by the landlord. (R. 299, 312) The judgment of the district court in that case, of December 31, 1946, which contained the injunction against franchises on which the eviction suit was based, and which had been vacated as to franchise by this Court in its decision of May 3, 1948, was offered and accepted.

That judgment also contained injunctions against the conspiratorial and monopoly admission price fixing, the unlawful system of runs and clearances, and similar practices. It was based on findings, sustained by this Court, that the respondents and others had engaged in the conspiracy in restraint of trade on which the counterclaims in this case are based. (70 F. Supp. 54) But the judgment was offered by the landlord "for the limited purpose only of showing Paramount as being subject to the injunctive features" of the judgment, "for the limited purpose of the court considering those portions of that decree pertinent to

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this case of the unlawful detainer." (R. 128-130) To make certain whether this limitaion affected the judgment as evidence of the conspiracy, petitioners objected to the limitation because it emasculated the judgment of its intrinsic, conclusive and legal, evidentiary quality in that regard. But the objection was overruled, and the court expressly refused to give the judgment any evidentiary effect at all as to the existence of the conspiracy. In overruling the objection, the trial judge said, "when it comes your turn, if you want to introduce it or make a motion that it be received *in toto,* you can." (R. 130-131) Petitioners' turn never came, however, because of the surprise dismissal of the counterclaims.

A second judgment in the government case, entered March 4, 1949, was also offered and received, subject to the same limitation, and over the same objection. (R. 131-132) Both judgments, by section 5 of the Clayton Act, were admissible as *prima facie* evidence in support of the treble damage claims at the trial of those claims. Correctly considered, the judgments, when offered by the landlord, became conclusive admissions by the landlord against himself of all facts concluded by the judgments against the parties to the judgments, of which the landlord's sole stockholder was one. This made the judgments conclusive evidence of the conspiracy. The only possible justification for the refusal to give the judgments this effect in the eviction suit, was that conspiracy was not an issue in that case and that the counterclaims were not then on trial.

Evidence offered by petitioners to show that the attempt to evict petitioners was in pursuance of the conspiracy in restraint of trade, was excluded on the ground that conspiracy was not an issue in the eviction suit. In thus excluding evidence, the trial court said:

> The question before this court, as far as the franchise agreement is concerned, is whether or not that agreement tends to monopolize the motion picture business here in Los Angeles. (R. 134)

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From time to time throughout the trial, the trial judge made statements to the effect that as of the time the several statements were made, no evidence of conspiracy had appeared in the case, thus making plain that the order separating the two cases for trial and postponing and excluding the issue of conspiracy until the later trial of the counterclaims, was being continuously observed by the court and the parties. On the twelfth day of the trial the trial judge said:

> So far as this case (sic), there hasn't been one iota of evidence to indicate there was any conspiracy with Paramount, Fox, Warner Brothers, or any other producer or distributor.
>
> The only thing you have got in this case so far is the decision in the Supreme Court case in which it says, "In the country as a whole there is a conspiracy." They didn't say in Los Angeles there is a conspiracy.[1] It might be inferred, because Fox, Warner Brothers, Paramount, and the other producers operated in Los Angeles, there is a conspiracy, but so far there hasn't been anything to show that any agreement that was made by Paramount was made in conjunction with a similar agreement made by Warner Brothers or even with Warner Brothers' or Fox's knowledge that the agreement was being made. (R. 137-138)

On the seventeenth and next to last day of the trial, the trial judge said:

> So far, in this case, there hasn't been any evidence of any kind that there has been a conspiratorial relationship between Paramount and any other of the distributors or the exhibitors. (R. 142)

In the evidence, the landlord was not held strictly to the issue originally approved by the court, namely, that the franchise standing alone was violative of the antitrust laws, or, as stated by the landlord's counsel, the "inherent validity or invalidity" of the franchise. (R. 46) In the trial,

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[1] The logic here seems to be that the "whole" of the country does not include that "part" which is Los Angeles.

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the landlord was permitted to depart from this thesis of "inherent validity or invalidity" and introduce evidence in an attempt to show that the franchise had caused restraints and monopoly conditions in the Los Angeles area.

In their counterclaims petitioners charged, in effect, that the restraint and monopoly conditions found as facts in the government case, also existed in the Los Angeles area, including the same conspiratorial admission price fixing, the same conspiratorial system of runs and clearances, and the same vertical combinations by which practically all the first run theatre business was restrained and monopolized for the benefit of Paramount and the other major picture and theatre companies.

But the evidence introduced by the landlord was carefully and voluntarily trimed to show the existence in the Los Angeles area of only some of the conditions revealed in the government case, and was carefully limited to the theory that they had been caused solely by this particular franchise. Petitioners, however, pointed out the perfectly obvious fact

> that none of the restraints and monopoly conditions that have existed here can be traced to this contract, to the terms of this contract. That all of the restraints and monopoly conditions that exist here exist because of the conspiratorial arrangements between Paramount and Fox West Coast principally. (R. 135)

At the close of the trial of the eviction suit, on December 21, 1950, the trial of the counterclaims was postponed by the court pending a decision of the eviction suit. In its opinion the district court stated:

> At the time of trial it was agreed that action on the counterclaims should be postponed until after the trial of the main issue involved, and no evidence was offered by either plaintiff or defendant on the counterclaims. (R. 94)

On May 2, 1951, the court decided the eviction case against the landlord, denying the eviction on the ground

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that the judgment in the *Paramount* or *government* case had not terminated the franchise (R. 93).

The court went further, however, and found that the franchise had not been made as a result of any combination or conspiracy between Paramount and others; and concluded that for that reason petitioners could not recover upon the counterclaims. The counterclaims were dismissed with prejudice. (R. 110) In its written opinion, the Court said:

> It appears that all of the counterclaims, with the exception of the third counterclaim, are based upon conspiracy. As we find no substantial evidence of a conspiracy in this case on the part of Partmar or Paramount, we are of the opinion that the counterclaimant cannot recover upon the first, second and fourth counterclaims. Therefore, it will not be necessary to take evidence on such counterclaims. (R. 94)

In its findings, conclusions and opinion, the court went out of its way to specifically find and approve as lawful in the Los Angeles area the very same facts and conditions of restraint and monopoly, which this Court and the district court in the government case held to be violative of the antitrust laws.

The Los Angeles district court found that in Los Angeles there existed the same vertical combination control by the picture companies of the first-run theatres, and that there existed the same system of runs and clearances by which the "cream" first run business was monopolized and independent exhibitors restrained and excluded, as was found by the district court and affirmed by this Court in the government case.

Specifically, the district court in this case found that—

> For many years in Los Angeles it was the established practice for each of the major motion picture producers to own and operate its own first-run theatre in downtown Los Angeles for the purpose of the initial run of pictures produced by the respective companies. (R. 101)
>
> . . . . . .

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Over the years producers and distributors have founded a course of conduct based upon the rights to exhibit films, first, second or third run within a given community.

Certain specified theatres have had the right of third-run; others have had the right of second-run, while still others have had the right of first-run.

Producers and distributors have also built up a policy of clearance between the end of the first run and the beginning of the second run, the end of the second run and the beginning of the third run. (R. 102)

These findings are closely parallel to those of the District Court in the government case on the same subjects. The district court in that case stated:

But here we are presented with a conspiracy among the defendants to fix prices, runs and clearances which we have already pointed out was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integrations active aids to the conspiracy and has rendered them in this particular case illegal, however innocent they might be in other situations. . . . Here, the vertical integrations were a definite means of carrying out the restraints and conspiracies we have described. Moreover, we concluded in our prior findings, and the Supreme Court has affirmed our conclusion, that the distribution practices of the defendants constituted an attempt to obtain a monopoly in exhibition forbidden by the Sherman Act, . . .

In respect to monopoly power, we think it existed in this case. As we have shown, the defendants were all working together. There was a horizontal conspiracy as to price-fixing, runs and clearances. The vertical integrations aided such a conspiracy at every point.

. . . . . .

If an intent to exercise the power be thought important, it existed in this case, as we noted above in finding an attempt to monopolize. (*United States* v. *Paramount*, 84 F. Supp. 893-894.)

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Although in this case the court stated "we find no substantial evidence of a conspiracy", it actually found the facts which constitute conspiracy. It stated that the distributors had solved the problem of distribution of pictures among exhibitors by a "code of conduct" which had been developed and adopted by all of the major companies, for the regulation and allocation among exhibitors of runs, clearances, minimum admission prices, etc., and that the system of runs, clearances and fixed admission prices, had been "built up", "founded" and "established" by the distributors, as a "course of conduct" and "policy". (R. 79-80, 82, 84, 102) The inconsistency between the finding of no conspiracy and finding the constituent parts of conspiracy, was probably due to the failure of the court to realize the significance of the specific facts.

The court decided that this system of runs, clearances and fixed admission prices was not a conspiracy nor unlawful because the system was necessary, and that "as a matter of necessity" the distributors were forced to develop and apply a scheme and plan of distribution by which the runs and preferences in the exhibition of pictures were allocated. (R. 80, 81, 102, 106)

REASONS FOR ALLOWANCE OF THE WRIT

Dismissal of the Treble Damage Claims Without Trial Deprived Petitioners of Their Property Without Due Process of Law.

The right of petitioners to recover treble damages by reason of injury to their property and business, was a valuable property right. In sustaining the counterclaims as well pleaded and valid, the district court recognized the right of petitioners to a trial of the claims and to recover the damages proved.

Short of permitting petitioners to file the counterclaims and sustaining them as lawful claims, no more complete denial of due process of the law could occur. Dismissal of the counterclaims originated entirely with the trial judge, without any request therefor from the counterclaim defendants, without any previous notice to or knowledge of peti-

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tioners, without any hearing of any kind granted to any of the parties, without according petitioners at any time any opportunity whatever to present evidence in support of the claims, without requiring any evidence in rebuttal of the claim, and without the disclosure of any reason for dismissal by the district court except the brief statement that "we find no substantial evidence of a conspiracy in this case". (R. 94) The Court of Appeals likewise has failed to state any reason except the per curiam statement that the district judge "has thoroughly discussed the issues."

The judgment, in so far as it dismissed the counterclaims, was therefore void.

Mullane v. *Hanover Bank,* 339 U. S. 305, 313, 314;

Betts v. *Brady,* 316 U. S. 455;

Morgan v. *United States,* 304 U. S. 1, 18-20;

Powell v. *Alabama,* 287 U. S. 45;

Windsor v. *McVeigh,* 93 U. S. 274.

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. (93 U. S. 277)

The right to be heard is a constitutional right, and the entry of judgment against a party without hearing is a deprivation of due process of law.

American Surety Co. v. *Baldwin,* 287 U. S. 156, (1932);

In re Aughenbaugh, 125 F. 2d 887 (C. C. A. 3, 1942);

Osage Oil Refining Co. v. *Continental Oil Co.,* 34 F. 2d 585 (C. C. A. 10, 1929);

Wagoner National Bank v. *Welch,* 164 Fed. 813 (C. C. A. 8, 1908).

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This arbitrary dismissal of the counterclaim converted the action of the district court separating the two cases for trial and excluding the evidence of conspiracy, especially the exclusion of the judgments in the *Paramount* case as evidence of the conspiracy, into an injustice and a serious aggravation of the wrong. Moreover, it deprived petitioners of the very important right accorded by section 5 of the Clayton Act to use those judgments as *prima facie* evidence in the trial of their counterclaims.

Emich v. *General Motors Corp.*, 340 U. S. 558;
De Luxe Theatre Corp., v. *Balaban & Katz*, 95 F. Supp. 983, 986.

So far as the issue of conspiracy and the counterclaims were concerned, therefore, petitioners were effectively foreclosed, completely surprised and rendered helpless.

The injustice and illegality was further aggravated by the fact that the dismissal of the counterclaims was the result of a wholly one-sided procedure. As only one of the seven counterclaim defendants was a party to the eviction suit, no valid judgment on the counterclaims favorable to petitioners could, under any circumstances, have been awarded against respondents in the eviction suit. To be valid the decision against conspiracy must imply that a decision the other way was possible if supported by the evidence. A trial like that in this case in which only one of the parties could possibly prevail, is not a constitutional trial.

Another incongruity: the eviction suit arose under the California statute, and was in the district court on diversity of citizenship; whereas the counterclaims were in the district court under federal statutes. In effect, therefore, a California court has entered a judgment dismissing another action arising under federal law and pending in the United States district court.

It is evident that the court of appeals has not considered or decided at least two important questions in this case—

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(1) whether the dismissal of the counterclaims without trial lacks due process of law, and (2) whether it was not clearly erroneous to dismiss the counterclaims on the ground that the conspiracy on which they were based had not been proved, without receiving the judgments in the *Paramount* case which had been introduced in evidence by respondents, as conclusive evidence, or at least as *prima facie* evidence, of the conspiracy in the case on which the counterclaims were based.

In the *per curiam* affirmance, the court of appeals states that it affirms the judgment "for the reasons given" in the opinion of the district court. But there is no reason given in that opinion which even attempts to justify as valid the dismissal of the counterclaims without trial, or to justify as valid the failure to attribute any evidentiary value to the judgments as to conspiracy. The district court did not discuss, consider or explain its action in this regard. Those questions did not, of course, arise during the trial, which was confined to the eviction suit, nor until the dismissal occurred at the end of that trial. That action could not reasonably have been, and was not in fact, foreseen by petitioners, and no hearing of any kind on those questions has at any time been accorded by the district court. It follows that, if the court of appeals acted merely upon the "reasons" upon which the district court acted, both courts have ignored these two important questions.

It follows, also, that the court of appeals has reviewed the district court merely as to decisions of fact, and has concluded that its factual decisions were not clearly erroneous, although, as shown, grave questions of law only were presented. Petitioners made no complaint of any important facts found by the district court, as distinguished from some factual conclusions. As to facts, their complaint in the court of appeals was that the district court had no jurisdiction to find any facts as to conspiracy; that if the district court did have jurisdiction to find facts as to the conspiracy, it found the constituent facts which amounted to

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conspiracy and then made an erroneous conclusion from those facts against conspiracy; that, as any evidence disproving conspiracy which may have been received was received in a case to serve a wrongdoer, which it was contrary to public policy to entertain, no finding on the subject of conspiracy could be a valid bar to petitioners' counterclaims.

The Judgment Dismissing the Counterclaims Was Entered In Proceedings Instituted To Serve A Self Accusing and Adjudicated Law Violator.

The basic error in this case was to entertain the plea of the landlord upon the basis of his own unlawful conduct. He alleged that the restrictions imposed by him on the tenant of the theatre were unlawful, introduced the judgments in the *Paramount* case to prove the charge, and asked the district court to make the same decision made against him in that case (subject to the limitation stated *supra*, pp. 9, 12), and award him a judgment against the tenant for that reason. In *Warner Bros.* v. *Cooper Foundations*, 189 F. 2d 825, 829, the Court of Appeals refused to favor such a wrongdoer.

> While this is not an action to enforce or recover on an illegal contract the only right which the plaintiff has, the only right it could have, grows out of one. . . . The plaintiff pleaded the contracts which constituted the illegal arrangement. It could not make its case without proving them.

Little time and attention was needed to discover that the landlord based his claim on his own wrong, because it was definitely alleged on the face of his complaint; and not only was the unlawful character of the conduct undisputed, it was strenuously asserted by the landlord. The suit should, therefore, have been summarily dismissed. This case is a good illustration of the unwisdom, waste and injustice involved in violating the rule that courts should not listen to wrongdoers. This landlord and tenant case, brought

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under the California three-day eviction statute, occupied the attention of the district court during more than four years, from May 1, 1947, to June 18, 1951, (R. 26, 111)—in interluctory proceedings and hearings on thirteen different occasions and in eighteen daily trial sessions of the court, all of which required the preparation, submission and consideration of numerous briefs and legal memoranda. Eighteen persons were required to leave their own affairs and attend as witnesses. An expensive transcript of proceedings of more than three thousand pages, was accumulated. And in the end the case was decided on facts appearing on the face of the complaint and on a ground urged by petitioners at the earliest stage of the case, i.e., that the judgment in the *Paramount* case had no application to the franchise. (R. 77, 105)

The fact that the court refused eviction does not mean that it was not violating the rule against aiding wrongdoers in entertaining the suit. The court had no right to consider whether the landlord's self accusation was true or false. It was the duty of the court to take the landlord at his word. At most, the court merely decided that only a small portion of the conduct of the landlord, considered out of the environment and context of which it was a part, was lawful.

The Finding That the Franchise Was Lawful Standing Alone Is Not Conclusive of the Existence of the Conspiracy on Which the Counterclaims Were Based.

The reasoning of the district court evidently was that as the admission price fixing, exclusive dealing, and clearance provisions in one contract for one theatre were lawful, and as the pictures on which petitioners claimed to have paid excessive monopoly license fees were furnished pursuant to that contract, those provisions could not become unlawful simply because they were multiplied in many other contracts, nor, for the same reason, could the license fees be questioned in a treble damage suit.

The district court made at least four important decisions preceding the judgment based upon the elementary distinc-

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tion between the legality of acts standing alone and as part of conspiracy, especially the decision separating the eviction suit and the counterclaims for trial, with which its judgment was at variance.

Those decisions were to the effect that the issues in the eviction suit, i.e., first, whether the franchise had been prohibited by the judgment in the *Paramount* case, and later, whether the franchise was lawful standing alone, were distinct and different from the issues in the counterclaims, i.e., ~~first, whether the franchise had been prohibited by the judgment in the *Paramount* case, and later, whether the franchise was lawful standing alone, were distinct and different from the issues in the counterclaims, i.e.,~~ whether Paramount had engaged in the conspiracy in restraint of trade, and whether by reason thereof petitioners had been injured in their property and business. Those decisions were:

1. The decision striking from petitioners' answer in the eviction suit the defense that the landlord was engaged in the conspiracy in the *Paramount* case, and was attempting to evict the theatre tenant in pursuance of that conspiracy. The ground of this decision was that, as to the right of the landlord to recover possession of the theatre, the conspiracy was immaterial, and to urge it was an improper collateral attack on that right; in a word, that the issue in the eviction suit was not conspiracy and was not affected by the conspiracy.

2. The decision sustaining the counterclaims as well pleaded and valid.

3. The decision separating the two cases for trial, and the actual separate trial of the eviction suit.

4. The decisions limiting the evidentiary effect of the judgments in the *Paramount* case, when introduced by the landlord in the eviction case, to the fact that they contained a prohibition of franchises, and refusing to treat them as

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evidence of the conspiracy on which they were based and which they enjoined, or as evidence that Paramount was a participant in that conspiracy.

In effect, the district court has inverted the elementary rule that where there is a conspiracy in restraint of trade, "The plan may make the parts unlawful" (*Swift & Co.* v. *United States*, 196 U. S. 375, 396), and has decided that where one part is lawful standing alone, the plan is lawful. This distinction between the legal character of the parts separately and collectively, although specifically pointed out by this Court as applicable to the price fixing provisions of motion picture contracts, in *United States* v. *Paramount*, 334 U. S. 131, was disregarded by the district court. This Court said:

> For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic. . . . (334 U. S. 144)

Even if the fact that the pictures on which the monopoly film rentals were charged were furnished pursuant to a contract containing provisions which are lawful apart from conspiracy, would prevent a recovery of treble damages based on the film rentals, it does not follow that no recovery could be had when it shall be shown that those provisions were in fact parts of a conspiracy in restraint of trade. Petitioners have been deprived of their right to show that the price fixing and other restrictions of the contract were in fact parts of such a conspiracy.

The particular kind of contract on which petitioners licensed pictures, and the particular kind of lease on which they held the theatre, was immaterial to their claim for treble damages. That claim was based on the fact that they licensed the pictures and leased the theatre, that the picture and theatre rentals were affected by the conspiracy in restraint of trade, and that having paid license fees and

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theatre rentals under those conditions they were injured in their property and business by excessive charges.

Paterson Paper Co. v. *Story Paper Co.*, 282 U. S. 555, 561-562;
Ellis v. *Inman, Poulsen & Co.*, 131 Fed. 182, 186;
Gibbs v. *McNeeley*, 118 Fed. 120, 126;
Lowry v. *Tile Association*, 115 Fed. 27; aff. 193 U. S. 38;
Straus v. *Victor Talking Machine Co.*, 297 Fed. 791, 802-803.

The Court of Appeals Has Approved As Lawful the Very Same Restraints of Trade Disapproved As Unlawful By This Court and Prohibited By the Judgment In the Paramount Case.

Although, as has been shown, the subject of conspiracy was not an issue in this case, and petitioners have had no opportunity whatever to prove conspiracy, and conclusive evidence of conspiracy was excluded, almost half of the findings of fact and almost two-thirds of the text of the opinion of the district court, deal with that subject and decide that no conspiracy existed. (R. 79-90, 101-106)

The findings and opinion show that in the Los Angeles area the major picture distributing companies are continuing to practice the same system of runs and clearances and allocation of pictures among the exhibitors, the same vertical combination control by the major picture distributing companies of the first run theatres, the same preferential licensing of first run pictures to the vertical combination theatres and the same discrimination against independents, which were found by the district court and this Court in the *Paramount* case to exist on a nationwide scale, including Los Angeles, and to be the result of conspiracy and therefore unlawful.

Indeed, the judgments in the *Paramount* case which were introduced in evidence in this case by respondents were conclusive evidence of all of these facts, and should have been used as the basis of findings to that effect, for it was not

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permissible to receive those judgments on the curtailed basis which was approved by the court. Even for petitioners' treble damage counterclaims those judgments were *prima facie* evidence of the same facts, and the court was required to so receive and consider them in making any adjudication on the counterclaims.

The findings and opinion of the Los Angeles district court show that it also agreed with the district court and this Court in the *Paramount* case in their decision that this system was the result of conspiracy. Although the court in the present case said "we find no substantial evidence of conspiracy in this case", it specifically found the facts which constitute conspiracy. Thus, it said that a "code of conduct" a "scheme of distribution", a "course of action", and a "plan", had been "accepted and adopted", and "built up", by all of the major distributing companies, and was then in effect, for allocating the runs and clearances, and fixing minimum admission prices, etc., for theatres in the entire Los Angeles area. (R. 79-82, 101-103)

The Los Angeles court found that this system of runs and clearances was "a matter of necessity" because "some adequate scheme of distribution must be developed". (R. 80, 102)

The district court said:

> Obviously, it would be impossible for one motion picture producer to print sufficient film to permit distribution simultaneously to all theatres in the nation. Some plan had to be devised by which a few prints could be made and then prorated to exhibitors for use. (R. 80)

The statement implies, what is not correct, that someone in this case has made a contention that the illegality of the conduct of respondents was in not providing enough pictures for simultaneous use in all theatres. The error in the decision as to conspiracy, is that it was lawful for the distributors to devise and adopt the *conspiracy plan* for proration of the prints among exhibitors.

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While neither the findings nor opinion of the court literally so state, it is clear that the basis of the decision that the concertedly developed and operated run and clearance system did not constitute an unlawful conspiracy, was (1) that the system was "a matter of necessity", and (2) that no exhibitor "has the right, as a matter of law, to demand from a motion picture producer the right of prior runs". (R. 87, 102) The court has thus ruled, in effect that conspiracy and monopoly methods are necessary for the distribution of motion pictures in the Los Angeles area, that it is lawful for the distributors to choose their customers for the several runs according to the conspiracy method, and that exhibitors have no right to an opportunity to procure pictures by any other system.

The *per curiam* affirmance of the judgment in this case has made the opinion of the district court an authoritative and unqualified approval of the system of runs and clearances condemed as unlawful by this Court in the *Paramount* case. The Court of Appeals has accepted and approved the decision of the district court without qualification. The decision of the Court of Appeals, in full, is as follows:

> The Honorable Harry C. Westover, United States District Judge, has thoroughly discussed the issues of the above entitled case in an opinion printed in 97 Fed. Supp. 552, and we affirm the judgment for the reasons given therein.

This nullification of the benefit and authority of the *Paramount* case in the ninth circuit will make it impossible for any motion picture exhibitor injured by reason of the conspiracy and restraint in that case, to prevail in any suit for damages or injunction, now pending or hereafter instituted in that circuit, against the major picture distributors. About ten such cases are now pending in the Los Angeles court alone.

To that extent and in a large area of the country, at least, the decision of the court of appeals will vitiate a great public policy. The treble damage section of the Sherman

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and Clayton Acts were enacted as an aid in the achievement of the objects of the antitrust laws, and, with suits by the Attorney General for injunction and criminal prosecutions, is one of the three principal and co-equal methods provided by Congress for protection of the public against the formidable evils of restraints of trade and monopoly. As pointed out by this Court in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 751, the right to treble damages—

> stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the government of cost of enforcement. . . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold * * *.

So, also, the decision of the court of appeals will make it difficult, probably impossible, to enforce in that circuit the prohibitions of the judgments in the *Paramount* case intended to end the conspiratorial run and clearance system as well as the many other restrictive practices imposed on independent exhibitors.

As appears from two other cases—*Chorak* v. *RKO*, 196 F. 2d 225, and *Fanchon & Marco* v. *Paramount*, 100 F. Supp. 84—that conspiracy and those practices in the Los Angeles area have survived the judgments in the *Paramount* case. According to the opinion in the *Fanchon & Marco* case, the same restraints and monopoly conditions were still prevalent in that area later than the middle of 1951, four years after the first judgment and three years after the second.

In the Los Angeles area there are about 300 motion picture theatres, which constitute the customers seeking to procure pictures from the major picture companies. Fox West Coast Theatres Corporation, owned by Twentieth Century-Fox Film Corporation, a defendant in *United*

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States v. *Paramount*, 334 U. S. 131, is the largest operator and licensee of pictures in the area, with about 250 theatres, and is incomparably the largest renter of films in the area, paying about sixty percent or more of the total picture license fees. (*Fanchon & Marco* v. *Paramount*, 100 F. Supp. 87.)

There are about thirty-two first run theatres in the Los Angeles area, which in revenue represent the "cream" of the business. Fox operates seventeen, and four other major picture or theatre companies, defendants in *United States* v. *Paramount*, operate fourteen. Paramount has an interest in the other theatre, of which it has been required to divest itself by the judgment in the *Paramount* case.

The rest of the theatres in the area are owned and operated by independent exhibitors, most of whom own but one, and sometimes two and three theatres. In virtually every part of the area, the small independent exhibitors are near, and must compete against, one or more of the Fox West Coast houses, both for the pictures to show in their theatres, especially for the valuable first and second runs, and for public patronage for their theatres. In the competitive struggle for pictures, the small operators are still impeded and frustrated by unlawful exclusions and restrictions shown by the *Chorak* and *Fanchon & Marco* decisions and disapproved in *United States* v. *Paramount*, 334 U. S. 131; 66 F. Supp. 323; 85 F. Supp. 881. As this Court stated in that case.

> The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. (334 U. D. 162)

In the *Chorak* case the Court of Appeals for the Ninth Circuit also affirmed a judgment denying damages to an exhibitor despite the uniform and unanimous refusal of

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the major picture companies to furnish pictures for his theatre on an equal basis with his large competitor. (Certiorari denied by this Court on November 17, 1952; Justices Reed, Black and Douglass dissenting; 73 S. Ct. 186.)

In *Fanchon & Marco* v. *Paramount,* 100 F. Supp. 84, the district court at Los Angeles held that the uniform and unanimous refusal of the same picture companies to furnish pictures to an exhibitor for first run use on an equal basis with the largest theatre combination in the area, was "economically wise" and therefore lawful. Speaking of the conspiratorial run and clearance system, the district court in that case said

> No cases exist which hold that the system, *in itself,* is a violation of the antitrust laws. To the contrary, all the decisions which have come from the higher courts postulate the legality of these restrictions, condemning only unreasonableness in the preference. (100 F. Supp. 89)

The case is now pending on appeal to the Court of Appeals for the Ninth Circuit, but in view of the decisions in this case and the *Chorak* case, it will undoubtedly be decided in the same way by the Court of Appeals, unless the present case shall be reviewed and reversed by this Court.

The opinions in these two cases and in the present case, are the only reported decisions of the Los Angeles district court and of the Court of Appeals for the Ninth Circuit, in motion picture treble damage and injunction cases. The opinion in the *Fanchon & Marco* case has also become a leading authority in the ninth circuit, although not an opinion of the Court of Appeals but of the district court, because the Court of Appeals in its opinion in the *Chorak* case has approved and largely used the *Fanchon & Marco* case as the basis of its own decision, although that case is now pending on appeal and has not yet been argued or considered there.

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CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RUSSELL HARDY,
JAMES WALLACE KEMP,
HENRY SCHAEFER, JR.,
Attorneys for Petitioners.

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